

**STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of: Request of the Office of)
Regulatory Staff for Rate Relief to South)
Carolina Electric & Gas Company's Rates)
Pursuant to S.C. Code Ann. § 58-27-920)

DOCKET NO. 2017-305-E

**MEMORANDUM OF LAW OF AARP IN OPPOSITION TO
SCE&G'S MOTION TO DISMISS**

AARP¹, by and through counsel, pursuant to 10 S.C. Code Ann. Regs. 103-829 and Order No. 2017- 58-H of the Commission's rules, respectfully submits this Memorandum of Law in Opposition to SCE&G's Motion to Dismiss the above-captioned matter. In support of this petition, AARP maintains that the Public Service Commission has the authority to alter or amend the rates charged by SCE&G and, in fact, the responsibility to do so here, where the public utility is collecting excessive rates from ratepayers both to build, and now to abandon, the VC Summer nuclear reactors.

ARGUMENT

SCE&G, under the constitutionally suspect "Base Load Review Act" ("BLRA"), has repeatedly sought, and been granted, rate increases to support the ongoing construction of the VC Summer Nuclear Plants. On August 1, 2017, SCE&G filed a Notice of Intent to seek approval of yet another increase in electric rates under the BLRA, this time to recover costs for abandonment of the project. Facing swift and intense public outcry, SCE&G abandoned that Notice two weeks later. On September 26, 2017, the Office of

¹In 1999, the "American Association of Retired Persons" changed its name to simply "AARP", in recognition of the fact that people do not have to be retired to become members.

Regulatory Staff ("ORS") filed the above captioned action requesting that the Public Service Commission suspend collection of the revised rates granted under prior BLRA rate hearings and further, in the event the legislature repealed or amended, or a South Carolina Court invalidated the BLRA as unconstitutional, require that SCE&G return increased rates previously collected. AARP Petitioned to Intervene in support of ORS's filing on October 17, 2017 and has been granted intervenor status in this matter.

For the reasons stated herein, AARP opposes SCE&G's Motion to Dismiss the present action.

**THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION HAS THE POWER
UNDER S.C. CODE § 58-27-920 TO ADJUST UTILITY RATES IN A MATTER
INITIATED BY THE OFFICE OF REGULATORY STAFF**

Under SC Code § 58-27-920, the ORS may initiate an action to set rates for a public utility:

The commission may, after a preliminary investigation by the Office of Regulatory Staff and upon such evidence as to the commission seems sufficient, order any electrical utility to put into effect a schedule of rates as shall be deemed fair and reasonable, within such time as may be prescribed by order of the commission, which shall be not less than fifteen days, and an attested copy of the order must be served upon the utility and the Office of Regulatory Staff by registered mail or otherwise as provided by law.

AARP considered intervening in each of the last two rate increase requests under the BLRA related to the VC Summer nuclear plant. However, due to the nearly-automatic nature of rate hearings under the BLRA and the limited procedural opportunity it grants for meaningful public participation in rate review, AARP, in consultation with lawyers in the utility and ratemaking fields, chose not to intervene. The Commission decisions in those previous BLRA cases included the implicit promise of increased power generation

capacity through the VC Summer plant and the hope that eventual completion of the project might slow the significant rise in utility costs to consumers, including AARP's members. AARP chose to intervene here upon learning that in addition to SCE&G charging AARP's members to build the plant, under a plan providing that it would be operational in the future, but that the utility now intends to continue to charge them for the construction while abandoning the plant. All of which is to make certain that the investors of SCE&G do not suffer anything less than a full return on their investment, guaranteed on the backs of ratepayers in South Carolina.

In its Memorandum supporting its Motion to Dismiss, SCE&G argues that SC Code § 58-27-920, having been enacted in the 1930's is antiquated and was intended for the "early days of regulation." However, the statute was amended in 2007 to add ORS by name and grant them the authority to initiate such investigations. Had the legislature in 2007 believed that the statute did not have any current application, they could have repealed, rather than amending that section. South Carolina electric rates must still be "just and reasonable" under the law, and the Commission is charged with the responsibility to ensure that is the case. AARP would urge the Commission to deny the Motion to Dismiss and go forward with reversing all rate increases under the BLRA related to the failed nuclear project.

The Public Service Commission, under SC Code § 58-3-140 is granted the power to "supervise and regulate the rates and service of every public utility in this State..." SC Code § 58-27-810 requires "Every rate made, demanded or received by any electrical utility or by any two or more electrical utilities jointly shall be just and reasonable." Electric

service is an essential utility service, and consumers rely upon the Commission to protect them.

THE COMMISSION IS NOT REQUIRED TO RULE ON THE CONSTITUTIONALITY OF THE BASE LOAD REVIEW ACT TO FULFILL THE REQUEST OF ORS IN THE PRESENT CASE

The Office of Regulatory Staff has specifically reserved questions of the constitutionality of the BLRA to the Courts of this State in their initial request, asking only that the commission apply any later decision by a court that the Act is unconstitutional to amend its Order. Further, ORS has also made the same request as to any amendment or repeal of the BLRA by the legislature. ORS has not asked the Commission to rule on the constitutionality of the BLRA. Nonetheless, the Commission has the power under South Carolina law to determine the constitutionality of the statute as it applies to these parties, *i.e.* ratepayers. *Travelscape, LLC v. S.C. DOR*, 391 S.C. 89, 705 S.E.2d 28 (2011). The PSC cannot declare the act itself unconstitutional, but it can decide that the act is unconstitutional as applied to South Carolina Electric and Gas' electricity customers.

THE BASE LOAD REVIEW ACT IS CONSTITUTIONALLY SUSPECT

A. The Balance Between Ratepayers and Investors

The United States and South Carolina Constitutions require that there be a balance between ratepayers and investors in the utility market. *See Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418 (1898); *see also S.C. Cable TV Assn. v. PSC*, 313 U.S.48, 437 S.E.2d 38 (1993). Where, as here, ratepayers are required to fund the return on investment for investors who are financing the construction of a power generation plant by a utility, there is at least a semblance of balance where the ratepayers will eventually receive a benefit

of the new plant. However, once the utility decides to abandon the project, the equities shift considerably, leaving ratepayers in the position of paying not only the continuous and ongoing return for a failed investment, but also for the tear down and abandonment of that same investment. This in no way reflects a balance between investors and ratepayers; it simply requires ratepayers to foot the bill for a guaranteed return in a failed investment.

B. Procedural and Substantive Due Process

Ratepayers are granted little to no power to oppose adjustments to rates under the BLRA. In fact, ratepayers, some of whom were not customers of a utility at the time the initial BLRA approval took place, are subject to a steady dose of rate increases related to construction of a project that may or may not be completed in the future. Further, the BLRA then requires them to pay even greater rates, if and when the utility abandons the project. In effect, the BLRA takes away many safeguards against rate overreach by allowing the utility to virtually guarantee repeated rate increases without meaningful recourse to the consumer once a project is initially approved under the BLRA.

Ratepayers are captive customers. If Sony is developing an expensive new technology for televisions and chooses to raise the prices of their existing televisions to pay for it, consumers have the option to buy Zenith. If they then go on and charge even more for their existing televisions once they abandon their new technology, they are likely to go out of business. The Commission is charged with regulating prices for electricity because SCE&G's customers have no other choice for this essential service. At least for the time being, most households in their service territory must get power from SCE&G, or

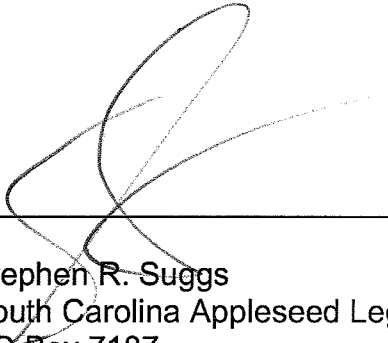
simply live without. Without regulation of its prices, SCE&G could conceivably charge any price they wanted that was more palatable than freezing in the winter.

This is why the Courts have consistently required a balance between ratepayers and investors in ratemaking. The BLRA upends this balance by allowing SCE&G to charge customers for building something that will never be built and then also charge for cleaning up the mess once the project has failed. Both Federal and South Carolina courts have held that transfer of private property from one private entity to another can be "takings" under the US and State Constitutions. See *Eastern Enterprises v. Apfel*, 524 U.S. 498, (1998) and *Ga. Dept. of Transp. V. Jasper Co.*, 355 S.C. 631, 586 S.E.2d 853 (2000). The combined procedural and substantive due process concerns with the BLRA statutory scheme are so unbalanced as to invoke constitutional concerns that will ultimately need to be addressed by the Courts. In the meantime, the Commission must fulfill its responsibility to protect consumers and prevent the manifest injustice that would occur from forcing consumers to pay for a power plant that is not operational, and which will never serve them.

CONCLUSION

For the foregoing reasons, AARP respectfully requests that the Commission deny the Motion to Dismiss and allow this case to proceed, granting ORS and other parties to opportunity to address the merits of this important case.

Respectfully submitted,



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